SOUTHERN BANK BHD

v.

CHUAH BENG HOCK

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[ORIGINATING SUMMONS NO: 24-169-98]
4 JANUARY 1999

LAND LAW: *Charge - Notice of default with respect to a charge - National Land Code 1965, s. 254 - Form 16D - Inclusion of unsecured charge - Whether notice flawed - Whether defendant prejudiced*

LAND LAW: *Sale of land - Application for - Whether there was existence of cause to the contrary - National Land Code 1965, s. 256(3)*

The defendant was granted a RM1.8 million loan overdraft facility from the plaintiff. This loan was secured by a legal charge on a piece of land ('the land'). Subsequently, an additional sum of RM700,000 was sought for by the defendant. Attempts to secure this loan as a second charge over the land was defeated as the Land Office rejected the application for its registration. Nevertheless, the plaintiff disbursed the additional sum of RM700,000 to the defendant. When the defendant defaulted in payments, a notice of demand in Form 16D pursuant to s. 254 of the National Land Code ('NLC') was served on him.

The issue before this court was whether the said form was flawed as it included the unsecured charge of RM700,000.

Held:

[1] By virtue of s. 243 of the NLC, no charge is effective unless registered. The NLC does not prohibit the creation of an equitable charge but it requires the charge to be registered in its prescribed form before it can be enforced.

[2] The inclusion of the unregistered charge would clearly prejudice the rights of the defendant. The land was only charged up to RM1.8 million. An additional burden of RM700,000 would only make repayment impossible. Further, by including this unsecured charge, the plaintiff had unilaterally given itself the right to recover it from the land in spite of being aware that attempts to have the second charge secured was defeated by the Land Office. If the Land Office was wrong in rejecting the registration of the second charge, the onus was on the plaintiff to correct the mistake by

some other remedy. The plaintiff should recover anything above RM1.8 million, from another source, perhaps as a judgment debt.

[3] By virtue of s. 256(3) of the NLC, there was the existence of cause to the contrary. Therefore, the application for the order of sale could not be entertained.

[Application dismissed.]

Cases referred to:

Bank Bumiputra Malaysia Bhd v. Esah Binti Abdul Ghani [1985] 2 CLJ 409 ***(refd)***

Bank Of Tokyo Ltd v. R Gnanasurian [1989] 2 CLJ 1276 ***(refd)***

Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144 ***(refd)***

Jacob v. Overseas-Chinese Banking Corporation, Ipoh [1974] 2 MLJ 161 ***(refd)***

Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 ***(refd)***

Kheng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457 ***(refd)***

Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd [1984] 1 CLJ 286 ***(refd)***

Malaysian International Merchant Bankers Berhad v. G & C Securities Sdn Bhd & Anor [1988] 2 CLJ 87 ***(refd)***

Malaysian International Merchant Bankers Bhd v. Chi Liung Holdings Sdn Bhd [1992] 2 CLJ 849 ***(refd)***

Mary Michael v. United Malayan Banking Corporation Bhd. [1971] 1 MLJ 172 ***(refd)***

Oriental Bank v. Chup Seng Restaurant (Butterworth) Sdn Bhd [1990] 2 CLJ 711 ***(refd)***

Siong Holdings Sdn Bhd v. Development & Commercial Bank Bhd [1997] 1 CLJ 590 ***(refd)***

Southern Bank Bhd v. Shin Huat Joo Enterprise Sdn Bhd & Ors [1998] 3 CLJ 941 ***(aff)***

Syarikat Kewangan Melayu Raya v. Malayan Banking Bhd [1984] 1 CLJ 78 ***(foll)***

Legislation referred to:

Interpretation Acts 1948 and 1967, s. 4(3)

National Land Code 1965, ss. 243, 253, 254, 256(3)

Other source referred to:

National Land Code, Judith Sihombing, pp 498, 499

For the plaintiff - Wong Hock Mun; M/s Azim, Ong & Krishnan

For the defendant - HP Chuah; M/s Onn & Partners

Reported by Usha Thiagarajah

a

JUDGMENT

Suriyadi Halim Omar J:

The defendant enjoyed an overdraft facility for the sum of RM1.8 million from Southern Bank Berhad pursuant to an agreement. This facility was secured by b fixing a legal charge over a piece of land under title No. HS(D) 6694, PT 73, Kawasan Bandar XXXI, District of Melaka Tengah. Subsequently an additional sum of RM700,000 was sought for by the defendant from the plaintiff, thus increasing the facility to RM2.5 million. This additional RM700,000 was conditional on the same piece of land being charged a second c time in favour of the plaintiff. When the material document was brought to the land office for registration, that office refused to register the second charge. Inspite of that failure, the bank still disbursed the additional RM700,000. Therefore, for all intents and purposes the material land had only one charge over it. Subsequently, the defendant failed to make the periodical payments d and the plaintiff took up proceedings to foreclose the material land. By 13 May 1998, the gross sum owed, inclusive of interest had exceeded RM2.7 million. Pursuant to the agreement of the facility, and in line with s. 253 of the National Land Code, the plaintiff sent a notice of demand to the defendant, to the tune of RM2,725,415.20, inclusive of interest. The inclusion of interest in this statutory form for the RM1.8 million, is legally in order as it may be e legitimately included (*Jacob v. Overseas-Chinese Banking Corporation, Ipoh* [1974] 2 MLJ 161; *Mary Michael v. United Malayan Banking Corporation Bhd.* [1971] 1 MLJ 172). This act of the plaintiff for an order of sale is not an attempt to enforce a judgement debt, but merely enforcing a right as a chargee, by exercising his statutory remedy under the National Land Code 1965 f (*Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332; [1994] 1 MLJ 119; *Siong Holdings Sdn Bhd v. Development & Commercial Bank Bhd* [1997] 1 CLJ 590; [1997] 1 MLJ 340). The plaintiff is entitled to do so, as, by the creation of that charge it had acquired an interest in that land, *albeit* the legal title and ownership of the land still remaining vested in the name of the g registered proprietor. Further to this, in passing, by virtue of this legal predicament, the court's powers in relation to interest is also curtailed. It may only impose interest on the sum owing on the rate agreed between the parties from the date of the order to the date of the public auction.

h As delienated in the National Land Code, the plaintiff did the needful after hiccups occured in the adherence of the obligations by the defendant pursuant to the facility agreement. To retrace the steps undertaken, the plaintiff initiated the preliminary actions prior to the foreclosure proceedings, by serving a letter of demand to the defendant (*Malaysian International Merchant Bankers Bhd v. Chi Liung Holdings Sdn Bhd* [1992] 2 CLJ 849; [1992] 1 MLJ 735). Since

i

the plaintiff could not take immediate steps to sell the charged land, it awaited the expiration of the time as shown in the notice. Only after the chargor had breached his obligation relating to the repayment of money, did a form 16D follow in its wake, pursuant to s. 254 of the National Land Code. This seemingly simple and succinct form 16D unfortunately was objected to by the defendant, on the premise that that form was invalidated, as it included the additional RM700,000 disbursed to him. The inclusion of this sum was objected to as it tantamounted to an unregistered charge being included in that statutory form. I accepted the objection and dismissed the saman pemula. I now give my reasons for dismissing it.

A foreclosure action is a separate action to that of any kind of contractual agreement and may be undertaken by an aggrieved party regardless of the existence of that agreement (*Bank Bumiputra Malaysia Bhd v. Esah Binti Abdul Ghani* [1985] 2 CLJ 409; [1986] 1 MLJ 16; *Malaysian International Merchant Bankers Berhad v. G & C Securities Sdn Bhd & Anor* [1988] 2 CLJ 87; *Bank Of Tokyo Ltd v. R Gnanasurian* [1989] 2 CLJ 1276; *Southern Bank Bhd v. Shin Huat Joo Enterprise Sdn Bhd & Ors* [1998] 3 CLJ 941). I even had occasion to comment at p. 962, at para h in the case of *Southern Bank Bhd. v. Shin Huat Joo Enterprise Sdn Bhd & Ors*, thus:

> I do not intend to stray too much into this territory as it is settled law that creditors may commence action against guarantors simultaneously with foreclosure proceedings. They are at liberty to choose whatever course of action they desire ...

This additional right which is statutory based, to be effective, requires full compliance of the statutory provisions, inclusive of the relevant procedural aspects. Form 16D forms part of that procedural stage. In order to comprehend fully the practical aspect of this statutory form, I hereby reproduce in toto the material form 16D, currently being discussed:

NATIONAL LAND CODE
FORM 16D
(Section 254)
NOTICE OF DEFAULT WITH RESPECT TO A CHARGE

TO:

Chuah Beng Hock
c/o Cherating Construction Sdn Bhd
155, Jalan Aminuddin Baki
Taman Tun Dr. Ismail
60000 Kuala Lumpur.

Chargor under the Charge described in the schedule below of the land so described.

Whereas you have committed a breach of the provisions of the Charge by failing to repay on demand the following sums:

Overdraft Facility Account No. 1036018739 Amount Outstanding as at 11.03.98 - RM2,725,415.20

Interest: Further interest to accrue at the rate of 2.5% p.a. above our client's base lending rate (BLR) currently fixed at 12.00% p.a. on monthly rests on the principal sum of RM2,500,000.00 and at the rate of 5% p.a. above our client's BLR on monthly rests on any excess over the principal sum from 12.03.1998 until the date of full settlement.

And Whereas the breach has continued for a period of at least SEVEN (7) DAYS prior to the date of this notice.

We, as Chargee, by virtue of the powers conferred by section 254 of the National Land Code hereby require you within the period the SEVEN (7) DAYS from the service of this notice to remedy the breach.

And take notice that if you fail to remedy the breach within that period, we shall apply for an Order and Sale.

Dated this 1st day of April, 1998.

... t.t ...

Solicitors for the Chargee
Azim Ong & Krishnan
5th Floor, Southern Bank Building
49, Jalan Hang Lekiu
50100 KUALA LUMPUR.

Although this statutory form is singular in expression, as it is "with respect to a charge", the law is clear that under s. 4(3) of the Interpretation Acts 1948 and 1967 (Act 388), singular words and expressions include the plural and words and expressions in the plural include the singular. The enunciation of this principle was firmly established when the Privy Council in *Syarikat Kewangan Melayu Raya v. Malayan Banking Bhd* [1984] 1 CLJ 78; [1984] 1 MLJ 115 opined so. So, why the different treatment with this case? At the outset permit me to clarify that the facts of the current case is distinguishable with that of the latter. In *Kewangan Melayu*, both the charges were registered whilst in the current case, only one was.

Before I proceed with the legal dissertation, it is quite necessary for me to refer to s. 243 of the National Land Code. As regards this section, Parliament in ringing terms had promulgated that every charge created under this Act shall take effect upon registration, so as to render the land or lease in question liable as security. In simple words, for purposes of the Act, no charge is effective unless registered. I am not unmindful of the case of *Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd* [1984] 1 CLJ 286; [1984] 1 MLJ 266, in particular where the Federal Court commented, *inter alia*, that there were no provisions in the National Land Code prohibiting the creation of equitable charges or liens. Mohamed Dzaiddin J in *Oriental Bank v. Chup Seng Restaurant (Butterworth) Sdn Bhd* [1990] 2 CLJ 711; [1990] 3 MLJ 493, after considering the above case of *Mahadevan & Anor*., adjudged that whilst the National Land Code 1965 did not prohibit the creation of an equitable charge, the Code on the other hand requires the charge to be registered in its prescribed form before it could be enforced. The facts of *Oriental Bank v. Chup Seng Restaurant* were that the plaintiff had stepped into the shoes of Citibank NA by subrogation and thereafter had wanted to enforce that right by wishing to obtain an order for sale. The only snag was that inspite of having paid Citibank in full, the plaintiff failed to have the fresh charge registered in favour of the plaintiff. Due to that failure, the plaintiff's application was dismissed. Mohd Dzaiddin J at p. 495, para B opined:

> It must, first and foremost, be recognized that the National Land Code 1965 adheres strictly to the principle of registration and recognizes only parties who are registered under the Code .... Secondly, s. 243 clearly stipulates that every charge created shall take effect upon registration so as to render the land or lease liable as security ... Thus, from the above sections of the Code it is abundantly clear to all and sundry that the Code recognizes only registered chargees.

This view was similarly held by Judith Sihombing in her book *National Land Code* at pp. 498 and 499.

Apart from the above reasons, the inclusion of the unregistered charge would clearly prejudice the rights of the defendant. I find support for this stance in the case of *Syarikat Kewangan Melayu Raya Bhd v. Malayan Banking Bhd. (supra)*, where Mohamed Azmi FJ said:

> In our view, whether a notice of default with respect to a charge or charges in Form 16D is bad in law would depend on whether the chargor has been prejudiced or misled by any defect in the notice so as to render the granting of the order of sale unjust, and this in turn must necessarily depend on the circumstances of each particular case.

In the current case, I fail to see how the defendant could not be prejudiced in the foreclosure proceedings when the land was only charged up to RM1.8m. An additional burden of RM700,000 would only make repayment impossible. The inclusion of the interest which emanated from the RM700,000 certainly will be of no help either. To summarise this point, by aggregating the additional RM700,000 with the RM1.8m, and therefore riding it together with the latter sum, the plaintiff had unilaterally and sneakily given itself the right to recover the said facility also from the same land. This course of action was undertaken inspite of it being aware that the attempts to have the second charge secured over the same land had unceremoniously been defeated by the land office. Whether the land office was wrong in rejecting the registration of the second charge, is another matter. Had it been wrong, the onus was on the plaintiff to correct the mistake by some other remedy. To conclude, it was thus encumbent upon the plaintiff, if it so wishes, to recover anything above the RM1.8 million (except for the interest built into it) from another source perhaps as a judgment debt.

In the circumstances of the case, as I was satisfied of the existence of cause to the contrary, I therefore could not entertain the application for order for sale (s. 256(3) of the National Land Code; *Kheng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457; *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144; [1991] 2 MLJ 283). In the latter case the court held that the form 16D was ineffectual and invalid as evidence showed that in that form was included the element of default interest. The remarks of Lim Beng Choon J there certainly would not be far off its mark, and applicable to the current case, where he said:

> It is not a simple case of the said notices of demand containing an erroneous sum but it is a case where the said notices were demanding payment of something to which the plaintiff bank had no right.

As in this case, the plaintiff had no right to demand the additional RM700,000 or the interest attached to it through the conduit of the National Land Code. On that premise I dismissed the saman pemula with costs.